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11

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND**

15 STATE OF CALIFORNIA, by and through
16 XAVIER BECERRA, Attorney General, and
the CALIFORNIA AIR RESOURCES
17 BOARD; and STATE OF NEW MEXICO, by
and through HECTOR BALDERAS, Attorney
General, *et al.*

Plaintiffs,

v.

DAVID BERNHARDT, Secretary of the
Interior; JOSEPH R. BALASH, Assistant
Secretary for Land and Minerals Management,
United States Department of the Interior;
UNITED STATES BUREAU OF LAND
MANAGEMENT; and UNITED STATES
DEPARTMENT OF THE INTERIOR

Defendants.

Case No. 4:18-cv-05712-YGR
[Consolidated with Case No.
4:18-cv-05984-YGR]

**BRIEF OF MEMBERS OF CONGRESS
AS *AMICI CURIAE* IN OPPOSITION TO
PLAINTIFFS' MOTIONS FOR
SUMMARY JUDGMENT**

Hon. Yvonne Gonzalez Rogers

Date: January 14, 2020

Time: 10:00 a.m.

Dept.: Courtroom 1, Fourth Floor
1301 Clay Street, Oakland, CA 94612

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1 **I. INTEREST OF THE AMICI CURIAE**

2 *Amici Curiae* are members of the United States Congress who have a strong interest in
 3 ensuring that we achieve the will of the electorate, maintain an effective balance of powers, and
 4 continue the critical development of oil and gas resources on our federal lands.

5 In contrast, this lawsuit is an attempt to seek political action through the courts. Plaintiffs
 6 and their supporting *amici* ask the Court to ignore Congress's role in setting national priorities and
 7 establishing the measure and limit of administrative-agency authority through legislation. They
 8 further ask the Court to ignore the President's authority to direct Executive Branch agencies where
 9 Congress has given the authority to do so. Plaintiffs' requested relief is inconsistent with
 10 Congress's laws, and it would impede Congress's aims to promote oil and gas development and
 11 cooperative federalism. Accordingly, *Amici Curiae* submit this brief in support of the intervenor
 12 defendants and in opposition to Plaintiffs' motions for summary judgment.

13 In the final days of President Obama's term following the 2016 presidential election, the
 14 Bureau of Land Management (BLM) promulgated the 2016 Rule,¹ which went beyond the BLM's
 15 congressionally authorized authority. The 2016 Rule impermissibly regulated air quality under the
 16 guise of the Mineral Leasing Act (MLA), and it would have restrained the development of
 17 domestically produced energy resources.

18 After the election, President Trump ordered the BLM to "immediately review existing
 19 regulations that potentially burden the development or use of domestically produced energy
 20 resources and appropriately suspend, revise, or rescind those that unduly burden the development
 21 of domestic energy resources beyond the degree necessary to protect the public interest or
 22 otherwise comply with the law." Exec. Order No. 13,783, § 1(c) (Mar. 28, 2017) ("E.O. 13,783").

23 In response, the BLM reviewed the 2016 Rule—as it must. The BLM realized that it had
 24 overstepped its regulatory authority and underestimated certain impacts of the 2016 Rule—
 25 particularly that many provisions "would have added regulatory burdens that unnecessarily
 26 encumber energy production, constrain economic growth, and prevent job creation." Waste

27 ¹ Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg.
 28 83,008 (Nov. 18, 2016) (the "2016 Rule").

1 Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision
 2 of Certain Requirements, 83 Fed. Reg. 49,184 (Sept. 28, 2018) (to be codified at 43 C.F.R. pts.
 3 3160 and 3170) (the “2018 Rule”). To correct those errors, the BLM replaced the 2016 Rule with
 4 the 2018 Rule. This was a necessary administrative action. It was a course-correction of the 2016
 5 Rule’s overreach, and it brought the BLM closer to its statutory authority.

6 *Amici Curiae*—and the American populace—have a strong interest in this critical matter,
 7 and these *amici*² ask the Court to uphold the BLM’s proper promulgation of the 2018 Rule. The
 8 2018 Rule, as guided by President Trump, lowers compliance costs and encourages domestic
 9 production of energy resources while maintaining reasonable restrictions on venting and flaring
 10 and allowing the States to regulate oil and gas operations within a cooperative-federalism
 11 framework. It avoids the 2016 Rule’s air-quality regulations, which were beyond the BLM’s
 12 granted authority and duplicative of the Environmental Protection Agency’s (EPA) regulatory
 13 responsibility (as determined by Congress). And it promotes—rather than constrains—economic
 14 growth in the United States. *Amici Curiae* support these goals.

15 **II. SUMMARY OF ARGUMENT**

16 Congress enacted the MLA to *promote* the prudent development of oil and gas. To make
 17 sure the development is effective and prudent, the MLA requires the BLM to ensure lessees use all
 18 “reasonable precautions” to prevent “waste” of oil and gas on federal land. Congress has not
 19 chosen to define “reasonable precautions” or “waste.” So, it is the BLM’s job to interpret those
 20 terms in line with guidance from the Executive Branch. President Trump provided the guidance
 21 shortly after his inauguration, calling into question the 2016 Rule. The BLM responded by
 22 promulgating the 2018 Rule. And the 2018 Rule is the appropriate culmination of the BLM’s
 23 interpretations of those terms.

24 While the 2018 Rule corrects the errors of the 2016 Rule, that fact is immaterial. The
 25 important point is that the BLM used its authority (correctly considered) to interpret the term
 26 “waste” in the MLA, and this Court should defer to that interpretation. The BLM corrected its

27 ² *Amici Curiae* have attached a list identifying themselves individually as Ex. 1 to the Declaration
 28 of Zachary W. Fitzgerald in Support of Motion for Leave to File Brief. (Doc. #131-1.)

1 prior unlawful attempt under a prior President to regulate air quality, a task that Congress
 2 entrusted to the EPA. The 2018 Rule removes this overlap and returns the task of regulating
 3 methane emissions to the proper persons.

4 Finally, the 2018 Rule provides for development of oil and gas resources on federal lands.
 5 Federal oil and gas development is critical for maintaining a strong domestic energy supply,
 6 creating jobs, and keeping energy costs low for all Americans. That Congress, the President, and
 7 the Executive Branch wish to focus on economic growth is a policy decision, and this Court
 8 should defer to it.

9 For those reasons, *Amici Curiae* would supplement the efforts of counsel in opposition to
 10 Plaintiffs' motions and raise the considerations in this brief to the Court's attention.

11 **III. BACKGROUND OF THE 2018 RULE**

12 In the 2018 Rule, the BLM properly revisited the 2016 Rule "in a manner that reduces
 13 unnecessary compliance burdens, is consistent with the BLM's existing statutory authorities, and
 14 re-establishes longstanding requirements that had been replaced." 83 Fed. Reg. 49,184 (Sept. 28,
 15 2018) (to be codified at 43 C.F.R. pts. 3160 and 3170). The BLM revisited the 2016 Rule because
 16 the President of the United States instructed it to do so. *See* E.O. 13,783. President Trump stated,
 17 "It is in the national interest to promote clean and safe development of our Nation's vast energy
 18 resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy
 19 production, constrain economic growth, and prevent job creation." E.O. 13,783, § 1(a). In line
 20 with President Trump's directives, the BLM reviewed the 2016 Rule and "determined it to be
 21 inconsistent with the policy in section 1 of E.O. 13783." 83 Fed. Reg. 49,185. After the BLM
 22 promulgated the 2018 Rule, Congress took no action to repeal it under the Congressional Review
 23 Act.³

24 ³ Although *amici* who support Plaintiffs appear to place much weight on the fact that Congress did
 25 not repeal the 2016 Rule under the Congressional Review Act, *see* ECF No. 110-1, at 6, Congress
 26 did vote on a resolution of disapproval on the 2016 Rule which passed the U.S. House on a
 27 bipartisan vote. Regardless, the Act itself states that a court should give *no weight* to a decision
 28 not to repeal a rule under the Act. "If the Congress does not enact a joint resolution of disapproval
 under section 802 respecting a rule, *no court or agency may infer any intent of the Congress from
 any action or inaction* of the Congress with regard to such rule, related statute, or joint resolution
 of disapproval." 5 U.S.C. § 801(g) (emphasis added).

1 In its review of the 2016 Rule, the BLM found that the 2016 Rule’s “approach to reduction
 2 of fugitive emissions and flaring departed from the historic approach of considering ‘waste’ in the
 3 context of a reasonable and prudent operator standard,” especially given that “the venting or
 4 flaring of some natural gas is a practically unavoidable consequence of oil and gas development.”
 5 83 Fed. Reg. 49,184–85. Further, the 2016 Rule “exceeded the BLM’s statutory authority to
 6 regulate for the prevention of ‘waste’ under the [MLA].” 83 Fed. Reg. 49,185. The 2016 Rule’s
 7 concept of “waste” constituted “a drastic departure from the concept of ‘waste’ applied by the
 8 Department of the Interior over many decades of implementing the MLA.” 83 Fed. Reg. 49,186.
 9 The BLM noted that the 2016 Rule misguidedly was “based on the premise that essentially any
 10 losses of gas at the production site could be regulated as ‘waste,’ without regard to the economics
 11 of conserving that lost gas.” *Id.*

12 But, contrary to the 2016 Rule’s novel interpretation of the term “waste,” “the BLM has
 13 historically taken the lease-specific circumstances faced by an operator—including the economic
 14 viability of capturing and marketing the gas—into account before determining that a particular
 15 loss of gas constitutes ‘waste.’” *Id.*

16 In the 2018 Rule, the BLM also noted that the 2016 Rule would have been
 17 uneconomical—an issue of critical concern to President Trump. The BLM found that “certain
 18 impacts were underestimated [in the 2016 Rule] and many provisions of the rule would have
 19 added regulatory burdens that unnecessarily encumber energy production, constrain economic
 20 growth, and prevent job creation.” 83 Fed. Reg. 49,184. The 2016 Rule “would have imposed
 21 costs exceeding its benefits,” and many of its requirements would “impose compliance costs well
 22 in excess of the value of the gas to be conserved.” 83 Fed. Reg. 49,184, 49,186.

23 For example, the 2016 Rule “would have affected existing wells, including a substantial
 24 number that are ‘marginal,’ or low-producing, and therefore less likely to remain economical to
 25 operate if subjected to additional compliance costs.” 83 Fed. Reg. 49,184. “[M]arginal oil and
 26 gas production on Federal lands supported an estimated \$2.9 billion in economic output in the
 27 national economy in FY 2015.” 83 Fed. Reg. 49,185. “To the extent that the 2016 [Rule] would
 28 have adversely impacted production from marginal wells through premature shut-ins, this

1 estimated economic output would have been jeopardized.” *Id.* “[A]pproximately 73 percent of
 2 wells on BLM-administered leases would be considered marginal wells and . . . annual compliance
 3 costs associated with the 2016 rule would have constituted 24 percent of an operator’s annual
 4 revenues from even the highest-producing marginal oil wells and 86 percent of an operator’s
 5 annual revenues from the [lowest]-producing marginal gas wells.” 83 Fed. Reg. 49,184.

6 The BLM also determined that the 2016 Rule contained “numerous administrative and
 7 reporting requirements that would have imposed unnecessary burdens on operators and the BLM.”
 8 *Id.* Therefore, the BLM promulgated the 2018 Rule, which “reduces unnecessary compliance
 9 burdens and, in large part, re-establishes the longstanding requirements that the 2016 rule
 10 replaced.” *Id.*

11 The 2018 Rule will provide greater economic benefit to the United States than the
 12 2016 Rule would have provided, because the 2016 Rule’s compliance costs for the industry and
 13 implementation costs for the BLM would exceed the 2016 Rule’s benefits. 83 Fed. Reg. 49,186.
 14 From 2019 to 2028, compliance costs would be \$1.63 to \$2.08 billion *less* under the 2018 Rule
 15 than under the 2016 Rule. 83 Fed. Reg. 49,204. Although royalties and cost savings would also
 16 be lower, the 2018 Rule’s *net benefit* to the United States will be \$720 million to \$1.08 billion
 17 *more* under the 2018 Rule than it would be under the 2016 Rule. 83 Fed. Reg. 49,204–05.
 18 *Amici Curiae* cannot ignore that expected result.

19 The 2018 Rule will also reduce “the potential economic harm to small businesses” that the
 20 2016 Rule would have imposed.” 83 Fed. Reg. 49,206. The BLM promulgated the 2018 Rule in
 21 line with President Trump’s directives, to provide a benefit—not a burden—to this country’s
 22 economy.

23 **IV. ARGUMENT**

24 **A. The Court Should Defer to the BLM’s Definition of “Waste.”**

25 Congress has recognized the importance of oil and gas development, and Congress enacted
 26 the MLA *to promote* the prudent development of oil and gas. *See* 30 U.S.C. §§ 223, 226; Mineral
 27 Leasing Act of February 25, 1920, Pub. L. No. 66-146, §§ 14, 17, 85 Stat. 437, 442, 443. To
 28 make sure the development is effective and prudent, the MLA requires that lessees “use all

1 reasonable precautions to prevent waste of oil or gas developed in the land.” 30 U.S.C. § 225.
 2 But, the MLA does not define “waste” or what the term “reasonable precautions” specifically
 3 contemplates. And, “it is for agencies, not courts, to fill statutory gaps.” *Nat'l Cable & Telecom.*
 4 *Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In this situation, Congress impliedly
 5 gave the BLM authority to develop a *reasonable* interpretation of the term “waste” and to assess
 6 which precautions would be “reasonable.” In the 2018 Rule—unlike in the 2016 Rule—the BLM
 7 acted within that authority, and the Court should defer to the BLM’s decisions in the 2018 Rule.

8 The fact that the 2018 Rule implements a different interpretation of “waste” than the 2016
 9 Rule is not cause to reverse the BLM’s decisions. An agency is “fully entitled” to change its
 10 mind. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 659 (2007). “[I]f the
 11 agency adequately explains the reasons for a reversal of policy, ‘change is not invalidating, since
 12 the whole point . . . is to leave the discretion provided by the ambiguities of a statute with the
 13 implementing agency.’” *Brand X Internet Servs.*, 545 U.S. at 981 (quoting *Smiley v. Citibank*
 14 (*S.D.*), *N.A.*, 517 U.S. 735, 742 (1996)). Even in *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837
 15 (1984), the Supreme Court “deferred to an agency interpretation that was a recent reversal of
 16 agency policy.” *Id.* at 982.

17 The BLM correctly changed its mind when it promulgated the 2018 Rule. An agency
 18 “must consider varying interpretations and the wisdom of its policy on a continuing basis’ for
 19 example, in response to changed factual circumstances, or a *change in administrations.*” *Brand X*
 20 *Internet Servs.*, 545 U.S. at 981 (quoting *Chevron*, 467 U.S. at 863–64) (emphasis added).
 21 Pursuant to President Trump’s directive, the BLM properly considered cost in the 2018 Rule as
 22 part of its regulation of waste. *Cf. Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) (“Agencies
 23 have long treated cost as a centrally relevant factor when deciding whether to regulate.”). “The
 24 Mineral Leasing Act of 1920 allows BLM to grant leases for the ‘economically sound and stable’
 25 development of federal mineral resources, including gas and oil, on public or private lands where
 26 the federal government controls subsurface mineral estates.” *Ctr. for Biological Diversity v.*
 27 *Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1151 (N.D. Cal. 2013) (quoting 30 U.S.C. § 21a).
 28 While the MLA’s prudent-operator standard requires operators to use “reasonable diligence” and

1 “reasonable precautions” to avoid waste, the MLA does not require operators “to lose money
 2 capturing and marketing uneconomic gas.” 83 Fed. Reg. 49,186. Ultimately, the 2018 Rule
 3 “allows operators to continue implementing waste reduction strategies and programs that they find
 4 successful and to tailor or modify their programs in a manner that makes sense for their
 5 operations.” 83 Fed. Reg. 49,184.

6 Despite alarmist language from Plaintiffs and their supporting *amici*, the 2018 Rule
 7 discourages “excessive venting and flaring by placing volume and/or time limits on royalty-free
 8 venting and flaring during production testing, emergencies, and downhole well maintenance and
 9 liquids unloading.” 83 Fed. Reg. 49,184; *see, e.g., id.* at 49,199–49,203 (discussion of venting);
 10 43 C.F.R. §§ 3179.6 (2018) (general prohibition on flaring and venting, and requirement to flare
 11 rather than vent), 3179.101–04 (2018) (time and volume limits). The 2018 Rule also does not
 12 rescind completely the 2016 Rule. For example, the 2018 Rule retains the 2016 Rule’s “subpart
 13 3178 provisions, which incentivize the beneficial use of gas by making gas used for operations
 14 and production purposes royalty free.” 83 Fed. Reg. 49,184.

15 Additionally, the BLM did not create the 2018 Rule in a vacuum. The BLM considered
 16 opposition to the proposed 2018 Rule, but noted that commenters failed to provide any legal
 17 authority demonstrating that “the MLA either does not provide the BLM with the discretion to
 18 determine what constitutes ‘reasonable precautions’ and ‘undue waste,’ or that the BLM’s revision
 19 of the 2016 rule exceeds the BLM’s discretion in this area.” 83 Fed. Reg. 49,189.

20 Finally, Congress could have, but did not, use its Congressional Review Act authority to
 21 repeal the 2018 Rule. Plaintiffs and the *amici* supporting them may have wished for the opposite
 22 result, but that should have no bearing on this Court’s decision. This Court should defer to the
 23 BLM’s lawful exercise of the authority Congress gave to it as guided by the then-newly elected
 24 President and deny summary judgment.

25 **B. The 2018 Rule Removes Duplicative Regulatory Burdens of the 2016 Rule.**

26 In 2016, rather than adhere to Congress’s grant, the BLM used the MLA as a point of
 27 departure and acted beyond its legal authority in pursuit of a political end: regulating air quality
 28 under the guise of waste prevention even though the EPA already regulated air quality. When the

1 political winds changed, the Executive Branch took steps to address its error. *See* E.O. 13,783.
 2 President Trump specifically instructed the BLM to find ways to “avoid[] regulatory burdens that
 3 unnecessarily encumber energy production[.]” E.O. 13,783, § 1(a). In response, the BLM
 4 promulgated the 2018 Rule. Not only does the 2018 Rule hew closer to the authority granted by
 5 Congress, but also it addresses the onerous duplication of air-quality regulation in the 2016 Rule.
 6 This Court should defer to Congress’s and the President’s policy decisions and the BLM’s
 7 implementation of them in this case. *See Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435
 8 U.S. 519, 558 (1978) (“The fundamental policy questions appropriately resolved in Congress and
 9 in the state legislatures are *not* subject to reexamination in the federal courts under the guise of
 10 judicial review of agency action.” (emphasis in original)).

11 To promote oil and gas development, Congress has authorized the leasing, by private
 12 permittees, of land containing “valuable deposits of oil or gas[.]” *See* 30 U.S.C. §§ 223, 226;
 13 Mineral Leasing Act of February 25, 1920, Pub. L. No. 66-146, §§ 14, 17, 85 Stat. 437, 442, 443.
 14 Congress authorized the BLM to put conditions in those leases and permits requiring the lessees
 15 and permittees to “use all reasonable precautions to prevent waste of oil or gas,” or face the risk
 16 that the federal government would seek forfeiture of the leases and permits through court
 17 proceedings. 30 U.S.C. § 225 (emphasis added); Pub. L. No. 66-146, § 16, 85 Stat. at 442.
 18 Dating to 1920, Congress prescribed many of the leasing and permitting requirements, such as
 19 how to set royalty amounts. *See, e.g.*, Pub. L. No. 66-146, §§ 14, 17–18, 85 Stat. at 442–44
 20 (codified as amended as 30 U.S.C. §§ 223, 226). And Congress generally authorized the Secretary
 21 of the Interior to make “rules and regulations” necessary and proper for carrying out the purpose
 22 of the MLA: “To promote” prudent oil and gas production “on the public domain” subject to
 23 Congress’s prescribed limits. *See id.* at §§ 30, 32, 85 Stat. at 437 (quoted material), 449–50
 24 (codified as 30 U.S.C. §§ 187, 189).

25 Congress did *not* authorize the BLM to regulate air quality; instead, Congress gave that
 26 authority to the EPA. *See generally* 42 U.S.C. §§ 7401 *et seq.*; *Bell v. Cheswick Generating*
 27 *Station*, 734 F.3d 188, 190 (3d Cir. 2013) (“The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, enacted
 28 in 1970, is a comprehensive federal law that regulates air emissions under the auspices of the

1 [EPA].”). In the Clean Air Act, Congress laid out the procedures and substance required for
 2 meaningfully regulating air quality. 42 U.S.C. §§ 7401 *et seq.* Congress intended that the EPA—
 3 not the BLM—regulate air quality. And when the BLM looked again at the 2016 Rule, which the
 4 President directed it to do, the BLM realized that it had overstepped its bounds. *See* 83 Fed. Reg.
 5 49,186 (describing another court’s concerns on this issue and finding them valid).

6 In 2016, not only did the BLM stray beyond its authority, but also it created a *duplicative*
 7 regime to regulate air quality. Where agencies’ authorities overlap, they should “administer their
 8 obligations” to “avoid inconsistency.” *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). And,
 9 “an agency may not bootstrap itself into an area in which it has no jurisdiction.” *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (internal quotation marks and citation omitted). But, the
 10 2016 Rule “upend[ed] the . . . cooperative federalism framework and usurp[ed] the authority
 11 Congress expressly delegated . . . to the EPA, states, and tribes to manage air quality.” *See*
 12 *Wyoming v. Dep’t of Interior*, 2017 WL 161428, at *8 (D. Wyo. 2017). “The asserted benefits of
 13 the [2016] Rule are . . . already subject to EPA and state regulations.” *Id.* at *12.

14 In the 2016 Rule, “the BLM . . . hijacked the EPA’s authority under the guise of waste
 15 management.” *Id.* at *8; *see also* 83 Fed. Reg. 49,186, 49,188, 49,191. Upon review of the 2016
 16 Rule, the BLM reached the same conclusion. In the 2018 Rule, the BLM explained, “[T]he BLM
 17 believes that the emissions-targeting provisions of the 2016 rule create unnecessary regulatory
 18 overlap in light of EPA’s Clean Air Act authority and its analogous regulations that similarly
 19 reduce losses of gas.” 83 Fed. Reg. 49,191. That unnecessary regulation and its associated
 20 burdens on “the development of domestic energy resources” are exactly what President Trump
 21 charged the BLM with removing. *See* E.O. 13,783, § 1(a).

22 The 2018 Rule respects Congress’s decisions regarding how to regulate air quality. It
 23 ensures that the BLM’s regulations “are justified as *waste-prevention measures* under the BLM’s
 24 MLA authority and do not usurp the Clean Air Act authority of the EPA, the states, and tribes.”
 25 83 Fed. Reg. 49,186 (emphasis added). That is why the BLM tailored the 2018 Rule to rescind
 26 “the provisions of the 2016 rule that imposed costs in excess of their resource conservation
 27 benefits or created the potential for impermissible conflict with the regulation of air quality by the

1 EPA or the States under the Clean Air Act.” 83 Fed. Reg. 49,186.

2 Additionally, further regulation of methane should be left to the States. In the MLA,
 3 Congress specifically recognized the States’ important roles in federal oil and gas development.
 4 30 U.S.C. §§ 187, 189. Congress *mandated* that provisions in federal oil and gas leases could not
 5 “be in conflict with the laws of the State in which the leased property is situated.” 30 U.S.C.
 6 § 187. And Congress *mandated* that its leasing laws could not “be construed or held to affect the
 7 rights of the States . . . to exercise any rights which they may have[.]” 30 U.S.C. § 189.

8 Although *amici* supporting the Plaintiffs claim that most of the States lack comprehensive
 9 oil and gas regulations, they neglect to mention that most of the States do not produce significant
 10 oil and gas from federal lands. Ten States are responsible for ninety-nine percent of federal oil
 11 and gas production, and they all have comprehensive regulatory regimes, including regulations
 12 that restrict the venting and flaring of gas from oil and gas wells. *See* 83 Fed. Reg. 49,188; Info.
 13 Mem. from Timothy R. Spisak, Acting Assistant Dir., Energy, Minerals & Realty Mgmt. 1
 14 (Oct. 19, 2017) (cited in the record for this case as AR 19).

15 And, regarding production on Indian lands, the BLM is required to act “in the best interests
 16 of the tribes or of the individual Indian mineral owners, considering all factors affecting their
 17 interests.” 83 Fed. Reg. 49,189. Unlike the 2016 Rule, the 2018 Rule properly acts in the best
 18 economic interest of the Indian mineral owners and properly allows the States that produce the
 19 most oil and gas from federal lands to regulate the industry appropriately.

20 C. **Development of Oil and Gas Resources on Federal Lands Is Critical.**

21 World War I forced the United States to reckon with the fact that it possessed “a perilously
 22 short supply” of oil. David W. Miller, *The Historical Development of the Oil and Gas Laws of the*
23 United States, 51 Calif. L. Rev. 506, 515, 528 (1963). If the United States wanted to contend at an
 24 international level, then it needed petroleum, and Congress accordingly passed the MLA in 1920,
 25 recognizing that “the discovery of these minerals [was] necessary for the prosperity of our
 26 country.” An Act to Promote the Mining of Coal, Phosphate, Oil, Gas, and Sodium on the Public
 27 Domain, Senate Debate on § 2775, 58 Cong. Rec. 4111 (1919); Miller, *supra* at 515 (citing and
 28 quoting Allan Nevins, *Three Fabulous Decades*, Am. Petrol. Inst. Q. 23 (1959)). However, the

1 MLA as originally enacted had not gone far enough to promote domestic energy development.

2 Thus, in the wake of World War II, the United States once again found itself “fearful of
3 [its] short supply” of oil, which led to Congress amending the MLA. Miller, *supra* at 528.

4 In 1946, prompted by the “great drain placed on our crude oil reserves by World War II . . .

5 Congress took steps to encourage more exploration and development of public lands.” Miller,
6 *supra* at 523–24. As Senator Joseph O’Mahoney of Wyoming explained:

7 The bill is the first general revision of the Mineral Leasing Act since
8 the act of August 21, 1935. . . . World War No. II has demonstrated
9 beyond peradventure of doubt that the salvation of this Nation
demands that we develop our petroleum reserves to the utmost, to
the end that this Nation shall not risk loss of either industrial or
political leadership.

10 S. Rep. No. 1392, at 1 (1946). These policy concerns remain true today.

11 *Amici Curiae* understand that the United States is, once again, a global energy leader and
12 the largest producer of both oil and natural gas. U.S. Energy Info. Admin., *Total Petroleum and*
13 *Other Liquids Production - 2018, International Dry Natural Gas Production - 2017*.⁴ It is
14 imperative that the BLM responsibly regulate federal oil and gas resources to avoid impeding that
15 hard-won status.

16 Oil and gas development generates jobs and revenue that affect federal, state, and local
17 budgets. There is no disputing that domestic energy production has helped to lower energy prices
18 for American businesses and families, which in turn have helped to stabilize and grow our
19 economy.

20 Additionally, as the States take the lead in regulating oil and gas development, domestic
21 energy production has fueled the States’ public-education services. For example, the New Mexico
22 Oil and Gas Association recently reported that oil and natural gas production have been a boon to
23 state education budgets:

24 Oil and natural gas production is the single largest source of revenue
25 for [New Mexico’s] budget, having provided \$2.2 billion in fiscal
26 year 2018 and currently providing [New Mexico] with a billion-
27 dollar budget surplus. Nowhere is that impact more evident than

28 ⁴ Available at <https://www.eia.gov/beta/international/> (last visited Aug. 28, 2019).

1 [New Mexico's] public schools where oil and natural gas industry
 2 contributed more than \$822.3 million to help [New Mexico's]
 3 school children have the best education possible. An additional
 \$240.5 million supported colleges and universities including the
 University of New Mexico and New Mexico State University.

4 N.M. Oil & Gas Ass'n, *Fueling New Mexico*, at 2.⁵ The regulatory approach embraced in the
 5 2018 Rule (and preceding the 2016 Rule) reflects a respect for cooperative federalism that
 6 Congress wrote into the MLA, and it benefits our nation as a whole and the States individually.
 7 See *Wyoming*, 2017 WL 161428, at *8, *12; cf. 30 U.S.C. §§ 187, 189 (deference to State laws).
 8 The 2016 Rule put all of those benefits in jeopardy.

9 *Amici Curiae* are glad that the BLM replaced the 2016 Rule with the 2018 Rule, which
 10 promotes oil and gas production from federal lands, the United States economy as a whole, and
 11 the well-being of the States. It is our hope that the BLM will continue to adhere to its legislative
 12 grant of authority and use that grant to work collaboratively, driving more innovative technologies
 13 that build upon existing methane-emissions decreases while also continuing to implement
 14 common-sense reforms such as the 2018 Rule.

15 **V. CONCLUSION**

16 The 2018 Rule returns the BLM to the authority that Congress granted. It returns to the
 17 proper definition of "waste"—which includes the compliance costs that would constrain economic
 18 growth—and removes the 2016 Rule's duplicative, unauthorized regulation of air quality. The
 19 BLM had to correct its course to respect Congress, the President, the States, and American
 20 businesses and families. *Amici Curiae* accordingly and respectfully ask the Court to uphold the
 21 2018 Rule and deny Plaintiffs' motions for summary judgment.

22 Dated: September 6, 2019

Ivan London

Zachary W. Fitzgerald

K. Lee Marshall

BRYAN CAVE LEIGHTON PAISNER LLP

25 By: /s/K. Lee Marshall

K. Lee Marshall

26 Attorneys for *Amici Curiae*

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 28 ⁵ Available at https://www.nmoga.org/benefits_of_oil_natural_gas (last visited Aug. 12, 2019) and
 authenticated as Ex. 3 to the Declaration of Zachary W. Fitzgerald. (Doc. #131-1.)

1 **CERTIFICATE OF SERVICE**

2 I certify that on September 6, 2019, I electronically filed the foregoing BRIEF OF
3 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS'
4 MOTIONS FOR SUMMARY JUDGMENT with the Clerk using the CM/ECF system, which I
5 understand to have caused service of the filing to all counsel of record.

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